

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 June 2007

Public Authority: London Borough of Southwark
Address: Town Hall
Peckham Road
London
SE5 8UB

Summary

The complainant asked the Council for information about the criteria it used to determine the appropriate grades for its staff positions. The request required disclosure of information about the Council's application of the Hay job evaluation scheme.

The Council withheld the requested information under section 43 of the Act on the grounds that release would prejudice the commercial interests of Hay Group.

The Commissioner decided that the Council had incorrectly withheld the information under the Act and that the information should therefore be released. He also decided that the Council had breached section 1 of the Act by its failure to provide information to which the complainant was entitled. He found that the Council had also breached section 17 of the Act by its failure to specify the exemption on which it relied to withhold part of the requested information and that it had failed to address the public interest test in respect of its withholding of all the requested information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 28 April 2005 the complainant requested the following information from the Council:

'Could you please supply me with a copy of the criteria used to determine gradings for posts in Environmental Health and Consumer Services. (In colloquial terms 'How the Hay scheme works'). This is a formal request for information under the Freedom of Information Act 2000.'

3. The Council replied on 13 May 2005 with a general description of how the Hay job evaluation scheme works.
4. The complainant responded on 17 May 2005 stating that he was dissatisfied with the Council's response. He refined his request as follows:

'We seem to be using words differently. By criteria I meant the standards that the evaluators use to judge what grade is awarded: you appear to be using the word to indicate the areas at which they look...What I want to know is what is the scale of accountability, know-how and problem solving that is used to determine what is considered to be the appropriate grade for the job.'

5. The Council regarded the complainant's letter of 17 May 2005 as a request for an internal review, the outcome of which was provided in a letter of 2 June 2005. This letter served in effect as a refusal notice under section 17 of the Act.
6. The Council's refusal notice was stated as follows:

'... if this information were disclosed it would prejudice the commercial interests of Hay Management Consultants.

Section 43 of the Act sets out an exemption from the right to know if:

- *the information requested is a trade secret or*
- *release of the information is likely to prejudice the commercial interests of any person. (A person may be an individual, a company, the public authority itself or any other legal entity.)'*

The Investigation

Scope and chronology of the case

7. The complainant contacted the Commissioner on 7 June 2005 to formally complain about the Council's withholding of information concerning the criteria it uses to determine the grading of posts within its Environmental Health and Trading Standards Division.
8. On 12 July 2006 the Commissioner requested a copy of the withheld information from the Council to enable him to ascertain whether the exemption under the Act had been appropriately applied. On 20 July 2006 the Council replied that it was unable to adhere to the Commissioner's request as there was no single document available which contained the information. The Council also repeated the response it gave to the complainant that if it provided further information about how the Hay scheme works it would prejudice the commercial interests of Hay Group.

9. On 5 September 2006 the Commissioner wrote again to the Council asking that it prepare and send him within twenty days a copy of the information to which the complainant had been refused access together with an explanation from the Council of the prejudice it considered would result from disclosure. Because the Council had not provided an explanation of the public interest test as required when a qualified exemption is engaged, he also asked that the Council provide him with its consideration of the public interest arguments.
10. The Council responded on 29 September 2006 indicating its continued unwillingness to provide the Commissioner with the exempted information. The Commissioner therefore advised the Council that he would have cause to issue an Information Notice requiring release to him if the Council continued with its refusal.
11. The Council subsequently provided the Commissioner with an explanation of its application of the section 43 exemption and a consideration of the public interest test as requested. However, it stated that it was awaiting permission from Hay Group before it could provide him with the exempted information. The Council meanwhile reasserted its view that there was no single document which could completely answer the request as in its estimation it covered a span of some 70 posts with evaluations dating back to 1997.
12. On 16 November 2006 the Council provided the Commissioner with what it considered to be the exempted information. This comprised:
 - (i) a copy of an introduction to the Hay method entitled 'The Hay Guide Chart – Profile Method of Job Evaluation'.
 - (ii) a copy of the 'Local Authorities Guide Charts – Hay Group' - which sets out the factor plan used to establish job evaluation scores.
13. The Commissioner notes that the Council did not provide any of its internal documentation which would have directly demonstrated the Council's specific application of the guide charts and thereby its job evaluation rationale (as required by the request).
14. The Commissioner consulted with Hay Group during the course of his investigation. Hay Group informed him that it supports organisations in explaining the details of the evaluation process and outcome to individual job holders in order to facilitate the resolution of appeals and/or grievances. The company's expectation is that there should be a formal record of the job evaluation and the evidence that leads the evaluators to the relevant result. In the company's opinion there is nothing inherently confidential about this record (the rationale) and it would be common practice for the HR department of an organisation to share this information with the job holder along with a description of the job evaluation process and the Hay method. The company advised the Commissioner that it has no objection to individuals having sight of the guide charts in a controlled environment on the understanding that these are copyright materials and that

individuals must not use this knowledge for any reason other than understanding their own grading position.

15. The Commissioner consequently asked the Council to consider allowing the complainant informal access to the information in the manner advised by Hay Group. Whilst the complainant was happy to pursue this option the Council stated on 11 January 2007 that it was unwilling to do so.

Background information

16. Hay Group is a global business operating in more than 90 countries. It provides management consultancy services to both public and private organisations. The company states that its 'Profile Method of Job Evaluation' is used by more organisations on a worldwide basis than any other single type of job evaluation scheme. A recent survey found that of all the organisations in the UK that use a proprietary job evaluation scheme 83% use the Hay method.
17. The Hay scheme evaluates jobs against a set of common factors that measure inputs (required knowledge, skills and capabilities), throughputs (processing of inputs to achieve results) and outputs (expectation of end results). The content of a job is analysed relative to each factor and represented by a numerical value. The factor values are then totalled to determine the overall job size. Hay Group provides organisations which purchase the system with relevant training and guide charts to enable the necessary analysis that the process requires.

Analysis

Procedural matters

18. In correspondence with the Commissioner, the Council maintained that fulfilling the complete request for information would entail covering a span of some 70 posts with evaluations dating back to 1997. Whilst the actual number of job evaluation records deemed necessary to sufficiently answer the request may be debatable, the Council did not provide the complainant with any of the said information. In failing to do so the Council breached section 1 of the Act.
19. The Council failed to specify the exemption in the Act upon which it relied to withhold part of the requested information, namely the relevant job evaluation records. In failing to specify the exemption in this respect the Council breached section 17(1)(b) of the Act.
20. In its refusal notice the Council failed to address the public interest arguments that should have been weighed in its decision to maintain the exemption under section 43 of the Act. In failing to address the public interest test the Council breached section 17(3)(b) of the Act.

Exemption

Section 43 (commercial interests)

21. The information considered by the Council to be exempt under section 43 of the Act comprised:
- (i) a copy of an introduction to the Hay method entitled 'The Hay Guide Chart – Profile Method of Job Evaluation'. This gives a summary of the Hay factors and provides an explanation of how to arrive at a score using the Hay methodology.
 - (ii) a copy of the 'Local Authorities Guide Charts - Hay Group' which sets out the factor plan used to establish the job evaluation scores.
22. With reference to (i) - an introduction to the Hay method – the Commissioner observes that Hay Group has made the same introduction publicly available on the internet (and in a more comprehensive form) in a paper entitled, 'Hay Job Evaluation – Foundations and Applications'. Owing to the widespread publication of the material the Commissioner is not persuaded that any prejudice would result from its disclosure. He therefore does not consider the introduction to be exempt under the Act.
23. With reference to (ii) – a copy of the guide charts – the Commissioner does not consider that this item alone sufficiently encompasses the information required to properly answer the complainant's request. From the Commissioner's understanding, the minimum information that is required to adequately answer the request comprises:
- (a) provision of the relevant job evaluation sheets which record the Council's analysis and conclusions resulting from its application of the guide charts
 - (b) provision of the guide charts used by the Council as the basis for its job evaluations together with a copy of the evaluators' guide.
24. When it withheld information under section 43 the Council appears to have only considered part (b) - provision of the guide charts (along with the introduction to the Hay method which has been discounted as exempt material by the Commissioner). The requirement to consider disclosure under the Act of part (a) - the job evaluation records – was seemingly dismissed by the Council on the grounds that no single document could answer the request for information. In effect an essential constituent of the requested information was withheld by the Council without any reference to the Act.
25. The Commissioner considered whether the section 43 exemption might apply in respect of part (a) of the request. His conclusion is that it does not. In his consultations with Hay Group, the company affirmed that an organisation's evaluation scores (including the points at which one grade ends and another begins) are unique to the organisation which applies the methodology. Such scores are neither confidential nor copyright to Hay Group and according to the company some organisations provide this information to employees as a matter

of course. The Commissioner is satisfied that no prejudice would arise from disclosure of the information and therefore it should be released to the complainant.

26. Section 43, deployed by the Council to withhold the guide charts, is a prejudice-based exemption and as such it is necessary to establish the nature of the prejudice that might result from disclosure of the information.
27. The Council informed the complainant that in its opinion disclosure of the information would prejudice Hay's commercial interests but it failed to provide any explanation as to how it had reached this conclusion. The Commissioner therefore asked the Council to provide an explanation of the prejudice it considered might result from disclosure. The Council submitted that there were four reasons why prejudice might result if the charts were disclosed:
 - (i) competitors would have access to Hay Group's intellectual property
 - (ii) the guide charts are central to the methodology
 - (iii) if the information was used by untrained people it could bring the process into disrepute which could have a detrimental effect on Hay Group's reputation
 - (iv) if it became known that the Council had disclosed the information, the Council's own reputation might become tarnished - some companies might not provide services to the Council in the future and others may charge a premium for such provision.
28. The argument at 27(i) is based on the assumption that if information is deemed to be another's intellectual property it should not be disclosed. However, the fact that information may be someone's intellectual property does not of itself preclude its legitimate availability to others. Just as library books may be protected by copyright – their public availability is not restricted because of that status. Whilst it is acknowledged that there may be circumstances when some individuals might attempt to infringe intellectual property rights, this is a separate matter which is protected under other legislation.
29. The argument at 27(ii) appears to be based on the assumption that information that is considered to be central to a particular methodology should not be released. The inference drawn from this argument is that it is the essential nature of the information to the process which prevents its disclosure. The basis of the argument is akin to that for withholding information on the grounds of it constituting a trade secret. In its refusal notice the Council initially appeared to rely on both 43(1) (information constituting a trade secret) and 43(2) (information prejudicial to commercial interests) in order to withhold the requested information. In later correspondence with the Commissioner, the Council indicated that the information was exempt under 43(2) and that it had discounted further reliance on 43(1). However, the basis of the argument at 27(ii) appears to resurrect the Council's initial argument for withholding information on trade secrecy grounds.

For purposes of clarity, the Commissioner has addressed the issue of trade secrecy in his decision notice.

30. In the Commissioner's view, whilst the guide charts may be central to the methodology they do not possess the quality of being a trade secret. One of the main issues to consider when determining whether something is a trade secret is the ease or difficulty with which it can be properly acquired or duplicated by others. In this case it appears self-evident that the information is easy to acquire owing to the fact that any organisation may purchase it. The extent to which the information is known inside and outside the business and the extent of measures taken by the business to guard the secrecy of the information are other determinants of a trade secret. In this case, the process is widely marketed by Hay and the company's consultants provide training on its content to organisations throughout the world. Hay Group designs seminars to teach the process and it advertises these on the internet. It seems there are no company measures to guard the 'secrecy' of the information precisely because there is no trade secret to protect. Consequently, the Commissioner does not accept that any of the information constitutes a trade secret and therefore does not accept that prejudice would result from disclosure on the grounds that it is a trade secret.
31. The Commissioner is not persuaded by the argument set out at paragraph 27(iii). The possibility that information may be used by untrained individuals does not of itself preclude the legitimacy of its disclosure. The inference of the argument is that, on receipt of the information, untrained employees of an organisation might submit wild or improbable results in their attempts to improve grades and so bring the process into disrepute. This scenario, however, appears most unlikely in view of the fact that all job evaluations require management approval providing the counterbalance to unrealistic re-grading requests. If the inference of the argument is that untrained individuals may set up as alternative providers of Hay job evaluation schemes and in that way bring the Hay name into disrepute, then the fact that those individuals might be untrained is inconsequential. Presumably, Hay would wish to protect their commercial interests against any individual who set up as a bogus Hay agent whether trained or not.
32. The Commissioner is not convinced that the argument at paragraph 27 (iv) carries weight. A decision by a public authority to disclose information is limited to the particular facts of the case. The Commissioner does not accept that in the context of these facts disclosure of the information would cause the Council to gain a reputation as one that would disclose or be forced to disclose the contents of commercial agreements into which it enters. Any company that contracts with the Council will already be aware that, as a public authority, its commercial dealings are subjected to a greater public scrutiny than those of a private company. The commercial interests of private companies could in fact be more dependent on the procurement plans of a public authority rather than on the occasional release of commercial information under the Act.
33. With reference to the Council's obligations in this respect, the Secretary of State's Access Code issued under section 45 of the Act contains the following stipulation about a public authority's contract terms with commercial organisations:

'Public authorities cannot 'contract out' of their obligations under the Act. Unless an exemption provided for under the Act is applicable in relation to any particular information, a public authority will be obliged to disclose that information in response to a request, regardless of the terms of any contract.'

34. Although not specified as an argument by the Council, the Commissioner has considered the proposition which possibly underlies the argument at 27(i), namely that disclosure could increase the exposure to information that is already available and in so doing may provide easier opportunities (than those which already exist) for individuals to infringe Hay's copyright. Hay Group is already aware of individuals who have obtained copies of the guide charts and who offer their services to client organisations in place of Hay consultants. The question is whether a consequence of widening the current availability of information (as opposed to the issue of disclosure per se) is likely to be prejudicial to the commercial interests of Hay Group. It hinges on whether and to what extent an easing of access to information can be determined as increasing the likelihood of prejudice and how substantial or otherwise that possible prejudice may be.
35. A related issue is that the Hay process is protected by the company's built-in requirement that bespoke training is undertaken before the method can be properly practiced. According to Hay Group, a two day training course (tailored to the organisational setting) together with work under the guidance of a Hay Group consultant is necessary before an evaluator may be considered competent. The training and guidance does not form any part of the disclosure in this instance and to that extent, any likelihood that increasing the availability of guide charts alone might increase the incidence of 'sole traders' offering Hay evaluation services, is reduced.
36. The Commissioner's guidance on the test of prejudice (Freedom of Information Act Awareness Guidance No 20) advises that although prejudice need not be substantial, he expects that it be more than trivial. The phrase, 'likely to prejudice' has been considered by the courts in the case of R (on the application of Alan Lord) v. the Secretary of State for the Home Office. Although this case concerns the Data Protection Act, the Commissioner regards this interpretation as persuasive. The judgment reads:

'Likely connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not.'

In other words, the probability of prejudice occurring need not be more likely than not but there should certainly be substantially more than a remote possibility.

37. Having examined all the arguments the Commissioner considers that the Council has failed to demonstrate that prejudice would result from disclosure. As the exemption at section 43 is not engaged the Commissioner is satisfied that there is no formal requirement to explore the public interest arguments in this case. However, in view of the issue he sets out in paragraph 34, the Commissioner has

for the sake of completeness outlined the public interest arguments in this instance.

38. There are strong public interest arguments in favour of disclosure. These include the following:
1. The Hay method of job evaluation is used by the majority of public authorities in the United Kingdom. 83% of all organisations using proprietary evaluation schemes have adopted the Hay method. It can be deduced from this that the vast proportion of individuals employed in the public sector (and indeed those in the private sector) are directly affected by decisions made on the basis of this methodology. Because the income levels of millions of individuals are dependant on the application of Hay job gradings it is axiomatic that a process which impacts so fundamentally on the economic livelihoods of so many should be made transparent.
 2. Disclosure of the information facilitates the accountability of public authorities for decisions taken by them and in so doing fosters public confidence in those authorities.
 3. It allows individuals to understand decisions made by public authorities which affect their lives and in some cases assists individuals in challenging those decisions. In the complainant's words, 'Without this information the Council's decisions on what employees should be paid are not accompanied by reasoned explanations, cannot be distinguished from the arbitrary and are not understandable. Errors are undetectable much less correctable'.
 4. The major component of a local authority's annual expenditure is the cost of its employees' wages and salaries. For this it receives public funding from the council tax payer. Accordingly the disclosure of information regarding the integrity and quality of an authority's decision making in respect of this expenditure is a matter of legitimate public interest.
 5. The Hay job evaluation process underlies and defines the actual allocation and distribution of a substantial part of the United Kingdom's public sector expenditure. Disclosure of the process promotes accountability and transparency in the spending of the public purse.
 6. There is a strong public interest in understanding the circumstances in which public money is provided by public authorities to private companies such as Hay Group.
39. The Council did not address the public interest test when it withheld the requested information. It later put forward the following public interest arguments to the Commissioner in support of its decision to withhold the information:
1. There is no additional benefit to the public in supplying to a private individual the minutiae of how this methodology is applied.

2. It is not in residents' interests if disclosure opens the Council to litigation - it could impact on its reputation and might result in a financial penalty. However, the Commissioner has been informed by Hay (as outlined in paragraph 14 of this decision notice) that it supports organisations in sharing this information with individuals.

The Commissioner considered an additional argument which could be deployed in favour of withholding the information.

3. A public authority has the right to determine its reward strategy in the way that best fits the needs of the organisation and in accordance with normal negotiating practice. The Commissioner acknowledges this right. However, in his view it does not preclude the requirement for openness and transparency.
40. The Commissioner has weighed the competing public interest arguments as outlined above, and has concluded that in all the circumstances of this case, the public interest in maintaining the section 43 exemption is outweighed by the public interest in disclosure.

The Decision

41. The Commissioner's decision is that the Council did not deal with the request for information in accordance with the Act in that it incorrectly applied the exemption under section 43 to the requested information.
42. The Commissioner has also decided that the Council did not deal with the following elements of the request in accordance with the Act:
 - The Council breached section 1 of the Act by its failure to provide the complainant with information to which he was entitled.
 - The Council breached section 17(1)(b) of the Act by its failure to specify the exemption on which it relied to withhold part of the requested information, namely the relevant job evaluation records.
 - The Council breached section 17(3)(b) of the Act by its failure to address the public interest arguments when it withheld the requested information.

Steps Required

43. The Commissioner requires that the Council shall provide the complainant with the information requested within 35 calendar days of the date of this notice. The information necessary to fulfil the request comprises:

(a) provision of the relevant job evaluation sheets which record the Council's analysis and conclusions resulting from its application of the guide charts

(b) provision of the guide charts used by the Council as the basis for its job evaluations together with a copy of the evaluators' guide.

Failure to comply

44. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

45. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 5th day of June 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Relevant statutory obligations and provisions under the Act

Section 1 provides that –

‘Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request and

(b) if that is the case, to have that information communicated to him.’

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 43 provides that:

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).